

**GOVERNMENT OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY
DEPARTMENT OF COMMERCE
OFFICE OF THE DIRECTOR GENERAL OF FOREIGN TRADE
Udyog Bhawan, New Delhi-110011**

F. No. 18/06/2018-19/ECA-I | 263

Date of Order December, 2018

Date of Dispatch ^{13th} December, 2018

Name of Appellant : M/s Holoflex Ltd.,
23, Brabourne Road,
6th Floor,
Kolkata-700001.

Order Appealed against : Order-in-Appeal No. 18/202/14-15/ECA/KOL/Appeal-48/521 dated 05.03.2018 passed by the Additional DGFT, Kolkata.

Order-in-Review passed by : Shri Alok Vardhan Chaturvedi, Director General of Foreign Trade

Order-in-Review

M/s Holoflex Ltd., Kolkata has filed Review Petition dated 29.05.2018 against Order-in-Appeal No. 18/202/14-15/ECA/KOL/Appeal-48/521 dated 05.03.2018 passed by the Additional DGFT, Kolkata.

Facts of the case:

2. M/s Holoflex Ltd., Kolkata obtained an EPCG Authorization No. 0230000858 dated 27.01.2005 from RA, Kolkata to import Capital Goods (as a Manufacturer Exporter) for duty saved value of Rs. 2,17,317.25/- with an obligation of FOB Rs. 17,38,538/- (US\$ 37508.91) to be completed within a period of 8 years from the date of issue of the authorization as per the condition of the authorization.

2.1 Export obligation period expired on 27.01.2013.

2.2 The firm failed to furnish complete documentary evidence such as copy of Bill of Exports as an evidence of supply to SEZ to substantiate towards fulfillment of export obligation imposed against the EPCG authorization in spite of Show Cause Notice dated 26.04.2013 under Rule 7 of the Foreign Trade (Regulation) Rules, 1993, followed by Refusal Order dated 16.12.2013 and RA's letter dated 26.02.2014 and Show Cause Notice dated 04.09.2014 under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, as amended.

2.3 The firm neither responded to the Show Cause Notice and the Refusal Order nor appeared for personal hearing. Therefore, the Adjudicating Authority issued order to the firm and its Directors asking them to show cause the reason as to why the fiscal penalty should not be imposed under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, as amended, for violation of the conditions of the authorization and misuse of imported Capital Goods allowed with 'Actual User' condition at concessional rate of Custom Duty. The firm still did not submit the required documents or any other evidence of having fulfilled the export obligation imposed.

2.4 As the firm failed to submit the complete documents, the Adjudicating Authority, in exercise of the powers vested in him under Section 13 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, passed Order-in-Original No. 02/36/021/00325/AM05/1142 dated 07.11.2014 imposing a fiscal penalty of Rs. 2,00,000/- (Rupees Two Lakh only) in addition to payment of Customs duty and interest as applicable, on the firm and its Director under Section 11(2) of the said Act.

3. Aggrieved by the Order-in-Original No. 02/36/021/00325/AM05/1142 dated 07.11.2014, the applicant filed appeal on 29.01.2015 under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, before the Additional Director General of Foreign Trade (Appellate Authority), Kolkata to waive off pre-deposit of penalty amount, setting aside the Order-in-Original dated 07.11.2014.

3.1 A personal hearing was granted on 02.03.2015 by the Appellate Authority when Shri Pancham Surana, Director appeared on behalf of the appellant for personal hearing.

3.2 He stated that the goods were supplied to M/s Nokia India Pvt. Ltd., an SEZ unit through Blue Dart Courier Service. They had submitted all the related documents except Bill of Exports. Due to closure of M/s Nokia India Pvt. Ltd., they had requested Development Commissioner and Specified Officer of Chennai SEZ to confirm authentication of the said supply but no reply had been received by them.

3.3 He was advised to submit a written submission and deposit 10% of the pre-deposit of penalty amount or 100% Bank Guarantee of the penalty amount immediately in order to hear the appeal.

3.4 The appellant vide their letter dated 20.04.2015 deposited a pay order of Rs. 20,000/- being 10% of the penalty amount and requested to allow them three months time for submission of documents in support of proof of supply to SEZ unit.

3.5 The appellant vide their letter dated 20.06.2015 informed that they had approached PRC, New Delhi for waiver of submission of Bill of Exports for their supply of goods to SEZ unit under EPCG authorization.

3.6 Next date of personal hearing was allowed on 02.11.2015 and in reply, the appellant sent a mail requesting another date of hearing. Accordingly, next personal hearing was granted on 01.12.2015 when Shri Pancham Surana, Director of the company appeared before the Appellate Authority and stated that they had failed to file / obtain the Bill of Exports, though, they submitted all other documents towards fulfillment of export obligation. Later, the firm enclosed a copy of letter No. 01/36/218/86/AM16/EPCG-1 dated 13.07.2016 issued by DGFT, New Delhi wherein their request for waiver of submission of Bill of Exports was rejected.

3.7 The Appellate Authority examined complete facts of the case including submission made by the appellant with the appeal application. The company submitted all documents except Bill of Exports and expressed their inability to submit the same. Since the Bill of Exports is a mandatory document for obtaining export incentives as per Rule 30 of SEZ, 2006, the same can not be waived of.

3.8 Hence, in exercise of the power as vested in her under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, the Appellate Authority dismissed the appeal and upheld the Order-in-Original dated 07.11.2014 vide Order-in-Appeal No. 18/202/14-15/ECA/KOL/Appeal-48/521 dated 05.03.2018.

4. Aggrieved by the decision of Appellate Authority, the applicant has filed the present Review Petition dated 29.05.2018 stating that:

- 4.1 The Machineries were installed during the period 26.02.2005 to 28.03.2005 against the EPCG authorization No. 0230000858 dated 27.01.2005 and thereafter, export production was started with these machines.
- 4.2 In the meantime, M/s Nokia India Pvt. Ltd., a 100% 'Finnish' company, was set up in SEZ at Sriperumbudur, Tamil Nadu as Nokia Telecom SEZ in the year 2006. They placed an order for supply of ICA Hologram for their unit.
- 4.3 The petitioner are aware of the fact that SEZ is considered to be a Deemed Foreign Territory and sale / supply to a SEZ unit or Developer by DTA unit will be considered as physical export in terms of clause (m)(ii) of Section 2 of SEZ Act, 2005.
- 4.4 Accordingly, the petitioner had supplied the Holograms to M/s Nokia India Pvt. Ltd., a unit in SEZ under the necessary invoice through Courier mode. An established courier company, M/s Blue Dart Courier Service, delivered the materials to Nokia India Pvt. Ltd. (located in SEZ). ~~Nokia India Pvt. Ltd.~~ and subsequently the petitioner were issued the Form "I" covering all the invoices raised by them. All these Forms "I" had been issued to them by the Development Commissioner, MEPZ SEZ. The confirmation of supply of goods by Blue Dart Express Ltd. to M/s Nokia India Pvt. Ltd., SEZ unit was communicated vide their letter dated 25.09.2014.
- 4.5 The petitioner were under impression that sale / supply of goods through recognized Courier will be treated as exports and no further Bill of Exports is required.
- 4.6 Thereafter, necessary payment advice by M/s Nokia India Pvt. Ltd. (through Bank of America) and Appendix-22B (Bank Certificate of Payments for Domestic Supplies) duly certified by the Banker, Punjab National Bank were issued. These documents clearly establish the fact that the goods were supplied to M/s Nokia India Pvt. Ltd. (a SEZ unit) and payment was accordingly made by them and the petitioner received it through proper channel.
- 4.7 In the meantime, the management of M/s Nokia India Pvt. Ltd. was taken over by M/s Microsoft Ltd. in the year September, 2013 and finally due to internal problems M/s Nokia India Pvt. Ltd. had shut down their factory from 1st November, 2014.
- 4.8 However, the petitioner had got confirmation from M/s Nokia India Pvt. Ltd. regarding supply of goods from their end.
- 4.9 From the records, as already submitted, it is evident that the goods produced by the machine imported against the subject EPCG authorization have not been diverted to other than SEZ and it is fully utilized for export production.
- 4.10 The above matter has already been taken up with Additional DGFT, Kolkata who in turn has forwarded the issue to DGFT, New Delhi for taking final decision in the matter.
- 4.11 In another similar case, as evident from the Minutes of PRC Meeting No. 07/AM17 held on 24.05.2016 that on a precedent occasion M/s Jupiter Solar Pvt. Ltd., on a request to DGFT, got a relaxation for requirement of Bill of Export.
- 4.12 Supply to SEZ under ARE-1 even if Bill of Export is not submitted, substantive benefit of rebate can not be lost if evidence of receipt of goods in SEZ in Form ARE-1 is available. [P.K. Tubes & Fittings Pvt. Ltd. in RE (2012) 276 ELT 113 (GOI)]
- 4.13 The petitioner does not ask any refund or extension or revalidation of any scrip nor do seek any other benefit from the authorities. The petitioner requests to exempt the requirement of Bill of Exports as proof of exports in this case, as was done in a preceding case of M/s Jupiter Solar Pvt. Ltd.

4.14 Furthermore, for closure / redemption / issuance of EODC of EPCG authorizations in case of supplies to SEZ units which have been made prior to 01.04.2015 and where exports proceeds have not been realized through Foreign Currency Account (FCA) of the SEZ unit in terms of SEZ Rule (8), it has now been decided to allow EODC.

4.15 Despite existence of precedence of relaxation from requirement of Bill of Export, their request for waiver of submission of Bill of Export in case of supply of goods to SEZ units against EPCG authorization No. 0230000964 dated 20.04.2005 has been turned down by PRC, DGFT, New Delhi vide its letter dated 13.07.2016, which the petitioner feels is discriminatory since on a precedent occasion this was allowed to M/s Jupiter Solar Pvt. Ltd. vide PRC Meeting No. 07/AM17 held on 24.05.016.

4.16 - In view of the above perspective and taking into account the fact that since the supply was bona fide and made genuinely to SEZ unit, all the documents presents the circumstantial evidence and clearly indicate bona fide nature of the transactions highlighting that the supplies were made and the payments thereof were realized.

4.17 The petitioner, in spite of the above facts and circumstance, is shocked and surprised to receive the Order-in-Original No. 02/36/021/00325/AM05/1142 dated 07.11.2014, whereby the Joint DGFT, Kolkata, under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, as amended, imposed fiscal penalty of Rs. 2,00,000/- on the petitioner and its Director and further held that the petitioner and its Director are responsible collectively and severally to deposit the said penalty amount in addition to the Customs duty and interest as applicable.

4.18 The petitioner, being aggrieved by and dissatisfied with the said Order-in-Original, an appeal was submitted to the Additional DGFT, Kolkata but the same has been rejected vide Order-in-Appeal No. 18/202/14-15/ECA/KOL/Appeal-48/521 dated 05.03.2018.

4.19 The Appellant has submitted the instant Review Petition to review the matter on the following grounds:

- (i) The order has been passed ex-parte without considering the vital facts and documents on record.
- (ii) The petitioner had duly submitted relevant and material documents from time to time and a reply to the earlier Show Cause Notice but the same does not find any reference in the impugned order.
- (iii) The impugned order has been passed mechanically in utter violation of principle of natural justice without giving an opportunity of being heard to the petitioner.
- (iv) The entire proceeding was directed by the respondent mechanically and in violation of principles of natural justice.
- (v) The respondent failed to appreciate that M/s Nokia India Pvt. Ltd., had issued Form "I" and based on description of material as given in Invoice attached to Form "I", the petitioner had supplied goods through Blue Dart Courier Service.
- (vi) The respondent failed to appreciate that supply of goods through recognized Courier will be treated as transshipment of goods and no further Bill of Export is required.

- (vii) The respondent failed to appreciate that necessary payment advice by M/s Nokia India Pvt. Ltd. (through American Bank) and necessary Appendix-22B (Bank Certificate of Payments for Domestic Supplies) duly certified by the Banker, Punjab National Bank clearly established that goods were supplied to M/s Nokia India Pvt. Ltd., and necessary payment was made by M/s Nokia India Pvt. Ltd., and payment was received by the petitioner. Hence, the clarification as sought for by FTDO vide his letter No. 02 / 21 / 021 / 00011 / AM06 / 912 have been complied with.
- (viii) The respondent failed to appreciate that the management of M/s Nokia India Pvt. Ltd. has been subsequently taken over by M/s Microsoft Ltd., in the year September, 2013 and finally M/s Nokia India Pvt. Ltd. has shut down their factory on and from 1st November, 2014. In the meantime, due to doldrums in the office of the Nokia-India-Pvt.-Ltd. and subsequently taken over the management of the company by Microsoft, there was no reply from them in supplying supporting documents as sought for. Hence the same could not be submitted for the reason beyond the control of the petitioner.
- (ix) The respondent failed to appreciate that in the aforesaid facts and circumstances, the petitioner finding no other alternative, had requested the office of the Development Commissioner, MEPZ SEZ with a copy to the concerned Specified Officer to further authenticate sale / supply of goods by the petitioner to M/s Nokia India Pvt. Ltd.
- (x) The respondent failed to appreciate that the goods imported against the subject EPCG authorization have not been diverted other than SEZ.
- (xi) The respondent failed to appreciate that based on mere absence of Bill of Export which the petitioner could not file in view of the reasons stated above, the matter may be considered to be nothing but a procedural lapse and the claim of fulfillment of export obligation should not be denied for the same. In this context, reliance is placed in the cases of Kansal Knit Wears vs. Commissioner of C.Ex. Chandigarh report in 2001(136) ELT 467 (Tri-Del) and Hindustan Dorr Oliver Ltd. vs. Commissioner of C. Excise, Ahmedabad reported in 2012(282) ELT 473 (Tri-Ahmedabad).
- (xii) The impugned order is, therefore, bad both in law and on fact.

4.20 In view of the facts, circumstance and submission made herein above, the petitioner has requested to set aside the Order-in-Appeal dated 05.03.2018, set aside the penalty of Rs. 2,00,000/- and set aside the order for collection of duty and interest.

5. The petitioner was granted Personal Hearing on 12.09.2018 at 3.15 PM to be heard by the Reviewing Authority. Shri Pancham Kumar Surana, Director appeared before the undersigned on the given date on behalf of the petitioner and explained their case.

5.1 I have gone through the facts and records of the case carefully. It is observed that as per rule 30 of the SEZ rules, 2006, exports to SEZ must be made against Bill of Exports. Bill of Exports has been mentioned in Appendix 5C as a necessary document to be submitted for evidencing EO fulfillment. Thus, it is clear that Appellate Order is in Order. I find no reason to interfere with the Appellate Order.

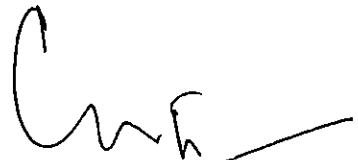
6. I, therefore, in exercise of powers vested in me under Section 16 of FTDR Act, 1992, as amended, pass the following order:

Order

F. No. 18/06/2018-19/ECA-I/264

Date of Order ^{13th} December, 2018

The Review Appeal is dismissed. Order-in-Original dated 07.11.2014 and Order-in-Appeal dated 05.03.2018 are upheld.



Alok V. Chaturvedi
Director General of Foreign Trade

To

1. M/s Holoflex Ltd.,
23, Brabourne Road,
6th Floor,
Kolkata-700053.
2. The Additional Director General of Foreign Trade,
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Kolkata-700069.



Tika Ram Majhi
Deputy Director General of Foreign Trade